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No. _____ OFFICE OF THE CLERK

In the

Supreme Court of the United States

UNITED STATES OF AMERICA EX REL. MOUNTHASONE BOTT; UNITED STATES OF AMERICA EX REL. SUSAN NEWMAN,

Petitioners,

v.

SILICON VALLEY COLLEGES; WESTERN CAREER COLLEGES; GREG NATHANSON; ELLIS C. GEDNEY; DARRYL LINDSEY; ALMICH & ASSOCIATES,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Section 487 (a)(20) of the Higher Education Act, 20 U.S.C. § 1094(a)(20), prohibits proprietary schools from paying any incentive compensation to their recruiters tied "directly or indirectly" to success in securing enrollments. The recruiter compensation statute is part of the eligibility requirements for students attending such proprietary schools to receive federal educational grants and insured student loans to pay the cost of their education.

The original implementing regulation adopted by the U.S. Department of Education, 34 C.F.R. § 668.14 (b)(22) (April 29, 1994), repeated the statutory language without elaboration. In 2002, eight (8) years after the passage of 20 U.S.C. 1094(a)(20), the U.S. Department of Education promulgated a new implementing regulation. 34 C.F.R. § 668.14(b) (22) (ii) (A) (Nov. 1, 2002).

The Ninth Circuit interpreted the 2002 regulation to permit mandatory minimum enrollment quotas for proprietary school recruiters.

QUESTION 1:

Does 34 C.F.R. § 668.14(b) (22) (ii) (A) (Nov. 1, 2002) conflict with the recruiter compensation statute, 20 U.S.C. 1094(a)(20)? Did the U.S. Department of Education exceed its rulemaking authority in adopting a regulation that is inconsistent with the Higher Education Act?

QUESTION 2:

Does the 2002 regulation violate the General Education Provisions Act ("GEPA"), 20 U.S.C. § 1232(a), which prohibits the U.S. Department of Education from adopting implementing regulations more than 360 days following the passage of a statute under the Higher Education Act?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Plaintiffs are Mounthasone Bott and Susan Newman, bringing this action on behalf of the United States.

Defendants are Silicon Valley Colleges, Western Career Colleges, Ellis C. Gedney, Darryl Lindsey, Greg Nathanson, and Almich & Associates. No public company owns more than 10% of Silicon Valley Colleges or Western Career Colleges.

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OPINIONS BELOW

The Ninth Circuit's panel opinion was rendered on January 4, 2008. The opinion is not reported. The order denying appellants' application for rehearing, and suggestion for rehearing *en banc* was entered on March 31, 2008 and is not reported. The district court's order denying relators' motion for leave to file motion for reconsideration was entered on January 4, 2006. The district court orders granting defendants' motions to dismiss were entered on October 5, 2005 and July 13, 2005. The lower court decisions are not reported.

JURISDICTION

The judgment of the Ninth Circuit was entered on January 4, 2008. Petitioner's timely petition for rehearing and suggestion for rehearing en banc was denied on March 31, 2008. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

Section 487 (a)(20) of the HEA, 20 U.S.C. § 1094(a)(20), provides in relevant part:

> The agreement shall condition the initial and continuing eligibility of an institution to participate in a program upon compliance with the following:
> * * *
> (20) The institution will not provide any commission, bonus, or other incentive payment based directly or indirectly on success in securing enrollments or financial aid to any

> persons or entities engaged in any student recruiting or admission activities or in making decisions regarding the award of student financial assistance, except that this paragraph shall not apply to the recruitment of foreign students residing in foreign countries who are not eligible to receive Federal student assistance.

Section 34 C.F.R. § 668.14 (b)(22) (April 29, 1994) provides in relevant part:

> (b) By entering into a program participation agreement, an institution agrees that —
> ....
> (22) It will not provide, nor contract with any entity that provides, any commission, bonus, or other incentive payment based directly or indirectly in securing enrollments....

Section 34 C.F.R. § 668.14(b) (22) (ii) (A) (Nov. 1, 2002) provides in relevant part:

> (22)(i) It will not provide any commission, bonus, or other incentive payment based directly or indirectly upon success in securing enrollments or financial aid to any person or entity engaged in any student recruiting or admission activities or in making decisions regarding the awarding of title IV, HEA program funds, except that this limitation does not apply to the recruitment of foreign students residing in foreign countries who are not eligible to receive title IV, HEA program funds.

(ii) Activities and arrangements that an institution may carry out without violating the provisions of paragraph (b)(22)(i) of this section include, but are not limited to:

(A) The payment of fixed compensation, such as a fixed annual salary or a fixed hourly wage, as long as that compensation is not adjusted up or down more than twice during any twelve month period, and any adjustment is not based solely on the number of students recruited, admitted, enrolled, or awarded financial aid. For this purpose, an increase in fixed compensation resulting from a cost of living increase that is paid to all or substantially all full-time employees is not considered an adjustment.

(B) Compensation to recruiters based upon their recruitment of students who enroll only in programs that are not eligible for title IV, HEA program funds.

(C) Compensation to recruiters who arrange contracts between the institution and an employer under which the employer's employees enroll in the institution, and the employer pays, directly or by reimbursement, 50 percent or more of the tuition and fees charged to its employees; provided that the compensation is not based upon the number of employees who enroll in the institution, or the revenue they generate, and the recruiters have no contact with the employees.

(D) Compensation paid as part of a profit-sharing or bonus plan, as long as those payments are substantially the same

amount or the same percentage of salary or wages, and made to all or substantially all of the institution's full-time professional and administrative staff. Such payments can be limited to all, or substantially all of the full-time employees at one or more organizational level at the institution, except that an organizational level may not consist predominantly of recruiters, admissions staff, or financial aid staff.

(E) Compensation that is based upon students successfully completing their educational programs, or one academic year of their educational programs, whichever is shorter. For this purpose, successful completion of an academic year means that the student has earned at least 24 semester or trimester credit hours or 36 quarter credit hours, or has successfully completed at least 900 clock hours of instruction at the institution.

(F) Compensation paid to employees who perform clerical "pre-enrollment" activities, such as answering telephone calls, referring inquiries, or distributing institutional materials.

(G) Compensation to managerial or supervisory employees who do not directly manage or supervise employees who are directly involved in recruiting or admissions activities, or the awarding of title IV, HEA program funds.

(H) The awarding of token gifts to the institution's students or alumni, provided that the gifts are not in the form of money,

no more than one gift is provided annually to an individual, and the cost of the gift is not more than $100.

(I) Profit distributions proportionately based upon an individual's ownership interest in the institution.

(J) Compensation paid for Internet-based recruitment and admission activities that provide information about the institution to prospective students, refer prospective students to the institution, or permit prospective students to apply for admission on-line.

(K) Payments to third parties, including tuition sharing arrangements, that deliver various services to the institution, provided that none of the services involve recruiting or admission activities, or the awarding of title IV, HEA program funds.

(L) Payments to third parties, including tuition sharing arrangements, that deliver various services to the institution, even if one of the services involves recruiting or admission activities or the awarding of title IV, HEA program funds, provided that the individuals performing the recruitment or admission activities, or the awarding of title IV, HEA program funds, are not compensated in a manner that would be impermissible under paragraph (b)(22) of this section.

Section 20 U.S.C. § 1232(a), the General Education Provisions Act ("GEPA"), provides in relevant part:

> [n]ot later than 60 days after the date of enactment of any Act, or any portion of any Act, affecting the administration of any applicable program.... Such schedule shall provide that all such final regulations shall be promulgated within 360 days after the date of enactment of such Act or portion of such Act.

STATEMENT OF CASE

Proceedings Below.

This action was instituted as a *qui tam* proceeding under the False Claims Act, 31 U.S.C. §§ 3729-3733. It alleges that defendants made false claims for federal student financial aid under Title IV of the Higher Education Act ("HEA"). Relators Mounthasone Bott and Susan Newman were recruiters at the San Jose, California campus of defendant Silicon Valley College. Relators initiated the action by filing a complaint *in camera* and under seal in the U.S. District Court for the Northern District of California. Service of process upon the defendants deferred was required by 31 U.S.C. § 3730(b)(2). The United States elected to decline to intervene. The district court ordered the file unsealed.

Defendants moved to dismiss plaintiff's original complaint. The United States Department of Justice filed a statement of interest in opposition to defendants' motion to dismiss. The United States argued that violation of the HEA's recruiter compensation statute is actionable under the False Claims Act as alleged by relators The district court held that mandatory minimum enrollment quotas did

not violate the safe harbor implementing regulations adopted in 2002, and granted defendants' motions to dismiss. Relators were granted leave to amend. Relators filed plaintiff's an amended complaint in response to the ruling. Defendant moved to dismiss plaintiff's amended complaint. On October 5, 2005, the district court dismissed Relators' amended complaint, and signed a final judgment dismissing the action with prejudice. The court had offered Relators a second opportunity to amend, which was declined due to the court's interpretation of the regulation at issue.

The Ninth Circuit ruled *per curiam* that the regulation was a reasonable interpretation of the Higher Education Act under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

(i) Statement of Facts

Defendant colleges received $175 million in student tuition paid by federally insured student loans and grants in the period under suit. Beginning in 1997, recruiters were required to sign employment contracts containing mandatory minimum quotas. Recruiters who failed to enroll their minimum quotas were terminated. Recruiters who exceeded their minimum quotas were given raises. The premise of relators' claim is that the mandatory enrollment quotas constituted an incentive salary structure that violated the prohibition in 20 U.S.C. 1094(a)(20).

Plaintiff's contentions are that the colleges violated the False Claims Act ("FCA"), 31 U.S.C. § 3729-3733,

by obtaining federal student financial aid they were ineligible to receive because their students were enrolled by recruiters who had to meet mandatory minimum enrollment quotas, or the recruiters would be fired. Such recruiters were compensated directly and indirectly based on the number of students they enrolled, in direct violation of 20 U.S.C. § 1094(20).

REASONS FOR GRANTING THE WRIT

The U.S. Department of Education has overstepped its authority with this regulation. Executive agencies, functioning as the "fourth branch of the Government," may not subvert the statutes under which they operate. The Department of Education acted legislatively, and thus unconstitutionally, by exceeding the parameters of the Higher Education Act, 20 U.S.C. § 1094(a)(20). *See, INS v. Chadha*, 462 U.S. 919, 967-969 (1983).

The "Internet Equity and Education Act of 2001" was passed by the House in 2001. The bill allowed for "salary adjustments" twice a year to relax the strict statutory ban against providing recruiters with any financial stake in outcome of a student's decision to enroll at the college. *See*, H.R. 1992, 107TH CONG., 1ST SESS. § 484C (2001). The "salary" exception would have allowed an inducement to increase enrollment by basing recruiter compensation on the number of enrollments generated. Under the amendment, only compensation "based *directly* on success" in securing enrollments — straight commissions and bonuses — would be disallowed [the word "indirectly" would have been eliminated from the

existing law]. The House bill passed on October 10, 2001.

The companion Senate bill never came up for a vote, and the measure failed. S. 1445, 107TH CONG., 1ST SESS. § 484C (2001).

Congress very directly addressed the precise changes contained in the 2002 regulation only one year earlier, when it considered amending 20 U.S.C. § 1094(a)(20). Congress rejected the language subsequently adopted into the regulation. *Chevron U.S.A. Inv. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). The U.S. Department of Education adopted the very exceptions that Congress refused to add to the statute prohibiting the payment of incentives compensation to recruiters at proprietary schools.

The 2002 regulation, however, contains thirteen (13) exceptions to the original statutory -- and regulatory -- provision. According to comments contained in the Federal Register, the U.S. Department of Education issued the safe harbors because, in the Agency's view, the prohibition on paying incentive compensation to recruiters is outmoded and unnecessary:

> "incentive payments are now just one of several remedies in place that prevent schools from unscrupulously recruiting qualified students."

67 Federal Register 67054 (Nov. 1, 2002). Congress made no exception for the so-called safe harbors

contained in 34 C.F.R. § 668.14(b)(22)(ii)(A) (Nov. 1, 2002).

A regulation that is in conflict with a statute "is a mere nullity." *Manhattan Gen. Equip. Co. v. Comm'r*, 297 U.S. 129, 134 (1936). "A regulation may not amend a statute." *Cal. Cosmetology Coalition v. Riley*, 110 F.3d 1454, 1460-61 (9th Cir. 1997).

"No money shall be drawn from the Treasury, but in consequence of appropriations made by law." Art. I, Sec. 9, Cl. 7. The constitutional limitation is absolute, and forbids payment of Government funds contrary to the will of Congress. "The oft-quoted observation in *Rock Island, A.& L.R. Co. v. United States*, 254 U.S. 141, 143, 65 L.Ed. 188, 189, 41 S.Ct. 55 that 'Men must turn square corners when they deal with the Government,' does not reflect a callous outlook. It merely expresses the duty of all courts to observe the condition defined by Congress for charging the public treasury." *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380 (1947). "Protection of the public fisc requires that those who seek public funds act with scrupulous regard for the requirements of law." *Heckler v. Cmty. Health Servs. of Crawford County, Inc.*, 467 U.S. 51, 63 (1984). "[P]ublic funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good, and not according to the individual favor of Government agents or the individual pleas of litigants." *OPM v. Richmond*, 496 U.S. 414, 428 (1990).

The regulation is void under the General Education Provisions Act. Under the General Education Provisions Act ("GEPA"), 20 U.S.C. § 1232(a), the Department of Education must submit a schedule for

promulgating regulations "[n]ot later than 60 days after the date of enactment of any Act, or any portion of any Act, affecting the administration of any applicable program.... Such schedule shall provide that all such final regulations shall be promulgated within 360 days after the date of enactment of such Act or portion of such Act." The 2002 regulation was adopted long after the statutory time bar that the U.S. Department of Education is allowed to promulgate regulations following passage a statute under the HEA. The U.S. Department of Education was time barred by more than eight years under the timetable for adopting regulations set forth in § 1232, which allows a maximum of 360 days after Congress enacts a statute under the HEA to adopt new regulations.

The Department of Justice filed briefs and appeared in several actions to obtain clarity on the responsibility of proprietary schools with respect to funds received while such entities are acting in violation of 20 U.S.C. 1094(a)(20). *See, e.g., United States ex rel. Main v. Oakland City College*, 426 F.3d 914 (7th Cir. 2005); *United States ex. rel. Hendow v. University of Phoenix*, 461 F.3d 1166 (9th Cir. 2006), *cert. den.*, 127 S.Ct. 2099, 167 L. Ed. 2d 813, 2007 U.S. LEXIS 4358.

Respectfully Submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 06-15423
D.C. No. CV-04-00320-CW

[Filed January 4, 2008]

UNITED STATES of America ex rel. MOUNTHASONE BOTT; UNITED STATES of America ex rel. SUSAN NEWMAN, Plaintiffs - Appellants,	)
v.	)
SILICON VALLEY COLLEGES; WESTERN CAREER COLLEGES; GREG NATHANSON; ELLIS C. GEDNEY; DARRYL LINDSEY; STEVE GALLAGHER; BARBARA BICKETT; JANETTE C. MARQUEZ; PATRICK SUTHERLAND; U.S. EDUCATION CORPORATION; GEORGE MONTGOMERY; LESLIE E. PRITCHARD; ALMICH & ASSOCIATES, Defendants - Appellees.	)

Appeal from the United States District Court
for the Northern District of California
Claudia Wilken, District Judge, Presiding

Argued and Submitted December 7, 2007
San Francisco, California

MEMORANDUM*

Before: **KOZINSKI**, Chief Judge, **COWEN**** and **HAWKINS**, Circuit Judges.

1. Relators have not pled with sufficient particularity any facts indicating that the periodic salary adjustments violated the Higher Education Act or its associated regulations. The Act does not prohibit salary reviews generally, but rather bars the payment of a "commission, bonus, or other incentive payment" solely on the basis of recruitment success. 20 U.S.C. § 1094(a)(20). Relators have not pled specific facts supporting the inference that salary reviews were performed solely on the basis of recruiting success. Nor have relators pled with sufficient particularity any facts demonstrating that the salary review system was merely a sham mechanism for funneling improper incentive pay. *See Bly-Magee v. California*, 236 F.3d 1014, 1018 (9th Cir. 2001). *Cf. United States ex rel. Hendow v. University of Phoenix*, 461 F.3d 1166,

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The Honorable Robert E. Cowen, Senior United States Circuit Judge for the Third Circuit, sitting by designation.

1169-70 (9th Cir. 2006) (alleging fraud with sufficient particularity).

2. The decision to fire an employee is not covered by the Act because termination is not a prohibited "commission, bonus, or other incentive payment." 20 U.S.C. § 1094(a)(20).

3. We need not determine whether the safe harbor regulation is actually valid. If defendants complied with a facially valid regulation, relators cannot show the required scienter under the False Claims Act for actions after the safe harbor regulation was promulgated. *See United States ex rel. Hochman v. Nackman*, 145 F.3d 1069, 1073-74 (9th Cir. 1998). The safe harbor regulation is not facially invalid because the Higher Education Act prohibits direct or indirect bonuses, while the regulation specifies permissible means by which to calculate base salaries. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984).

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 04-320 CW

[Filed January 4, 2006]

UNITED STATES OF AMERICA, Ex Rel. MOUNTHASONE BOTT and SUSAN NEWMAN,	)
Plaintiffs,	)
v.	)
SILICON VALLEY COLLEGES, et al.,	)
Defendants.	)

ORDER DENYING RELATORS' MOTION FOR LEAVE TO FILE MOTION FOR RECONSIDERATION

Relators Mounthasone Bott and Susan Newman move for leave to file a motion for reconsideration of the Court's October 5, 2005 order dismissing with prejudice their second amended complaint (SAC). Defendants U.S. Education Corporation (USEC),

Silicon Valley Colleges and Western Career Colleges (the Colleges), and Greg Nathanson, Ellis C. Gedney and Darryl Lindsey (collectively, USEC Defendants) and Defendant Almich & Associates (Almich) separately oppose the motion. Having considered all of the papers filed by the parties, the Court denies Relators' motion.

BACKGROUND

Relators brought this *qui tam* action under the False Claims Act (FCA), 31 U.S.C. § 3729 *et seq*, against all Defendants on behalf of the United States to recover all federal educational grants, including Pell Grants, and all payments on federally insured educational loans used to fund students at the Colleges. Relators alleged that Defendants knowingly and falsely stated that they were eligible to participate in grant and loan programs as authorized by Title IV of the Higher Education Act (HEA), 20 U.S.C. § 1070 *et seq*. 20 U.S.C. § 1094(a). The Colleges' eligibility is conditioned upon compliance with certain requirements, among others,

> The institution will not provide any commission, bonus, or other incentive payment based directly or indirectly on success in securing enrollments or financial aid to any persons or entities engaged in any student recruiting or admission activities or in making decisions regarding the award of student financial assistance . . . .

Id. § 1094(a)(20). The Department of Education (ED) has promulgated "safe harbor" regulations, which

clarify that institutions may provide their admissions representatives with

> fixed compensation, such as a fixed annual salary or a fixed hourly wage, as long as that compensation is not adjusted up or down more than twice during any twelve month period, and any adjustment is not based solely on the number of students recruited, admitted, enrolled, or awarded financial aid. For this purpose, an increase in fixed compensation resulting from a cost of living increase that is paid to all or substantially all full-time employees is not considered an adjustment.

34 C.F.R. § 668.14(b)(22)(ii)(A).

In their first amended complaint (FAC), Relators alleged that Defendants violated the federal law prohibiting incentive payments to admissions representatives by paying recruiters a "so-called 'salary' . . . that was directly tied to an enrollment quota for that recruiter." FAC ¶ 47. Pursuant to this alleged arrangement, recruiters who failed to enroll their minimum quota were terminated, while those who exceeded the minimum quota were retained and given raises.

In its July 13, 2005 order, the Court dismissed the FAC pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim and for failure to comply with Federal Rule of Civil Procedure 9(b)'s requirement that the FCA allegations of fraud be plead with particularity. The Court found that the FAC failed to state an FCA claim because the USEC

Defendants' alleged system of recruitment quotas, in which employees who fail to meet the minimum enrollment quotas are fired and those who exceed the minimum are retained and given raises, fell within the safe harbor provisions of the ED's regulations. The Court reasoned that, although pay adjustments could not be based "solely" on the number of students recruited, the safe harbor provision reflected the ED's understanding that institutions could base salaries or salary increases on merit. The Court found that, in fact,

> Relators have not alleged any conduct that falls outside the safe harbor regulations. For example, they have not alleged that the Colleges provide more than two salary adjustments in a year not related to cost-of-living, or adjustments based "solely on the number of students" recruited.

July 13 Order at 10. Because the practices alleged were protected by the regulations, the Court concluded that Defendants could not be held liable for fraud under the FCA, even if the ED regulations were inconsistent with the HEA.

In their SAC, Relators alleged generally and repeatedly that the Colleges paid their recruiters based "solely" on their success at enrolling students. They specifically alleged that Ms. Bott was given a minimum enrollment quota of approximately twelve students per month, and that she was fired after three months "solely because she failed to meet her enrollment quota." *Id.* ¶ 18. Relators alleged that sales representative Indy De Croos received two

$10,000 raises based "solely" on his continued success at securing enrollments. They alleged that Ms. Newman was "terminated solely for failing to meet her enrollment quota." *Id.* ¶ 25. In opposing Defendants' motions to dismiss the SAC, Relators insisted that these allegations of a compensation system related to mandatory minimum enrollment quotas and raises for those who exceeded quotas were sufficient to plead actionable fraud. At the September 16, 2005 hearing on Defendants' motions to dismiss the SAC, counsel for Relators stated that if the Court decided that Relators still had failed to plead fraud under the FCA in their SAC, Relators would prefer that the Court dismiss the case with prejudice to enable Relators to pursue an appeal.

In its October 5, 2005 order, the Court did find that the SAC's allegations did not demonstrate conduct by Defendants falling outside the protection of the ED's safe harbor regulations, and thus that Relators' claims were not stated with specificity as required by Rule 9(b). It found that other than insertion of the word "solely," the SAC's allegations did not differ substantially from the quota system described in the FAC, which the Court had found fell within the safe harbor provision. It found that in order to state their fraud claim, Relators would have to "allege with specificity a direct relationship between the raises given and the number of students enrolled," and that merely using the word "solely" was not specific enough. It also found that the allegations against the individual USEC Defendants, Nathanson, Gedney and Lindsey were so vague and conclusory that they did not allow each individual to know how he was alleged to have participated in the Colleges' conduct, and that

the allegations against Almich were likewise insufficient to state with particularity circumstances for which Almich could be held liable for false or fraudulent statements, even if the complaint had met Rule 9(b) requirements with respect to the USEC Defendants. The Court entered judgment in Defendants' favor on October 5, 2005.

LEGAL STANDARD

Relators move for leave for reconsideration pursuant to Federal Rule of Civil Procedure 59(e), which provides that a motion to alter or amend a judgment may be made within ten days of entry of judgment. However, the motion was filed on October 24, 2005, more than ten days after the October 5 entry of judgment. Therefore, the motion is treated as one for relief from final judgment under Rule 60(b). *See Am. Ironworks & Erectors, Inc., v. North Am. Const. Corp.*, 248 F.3d 892, 898-99 (9th Cir. 2001) (noting that a motion for reconsideration "is treated as a motion to alter or amend judgment under Federal Rule of Civil Procedure Rule 59(e) if it is filed within ten days of entry of judgment. Otherwise, it is treated as a Rule 60(b) motion for relief from a judgment or order.") (internal citation omitted).

Rule 60(b) is not merely a device to get another try; it is not an equitable response to the request for "just one more time, please." Rule 60(b) enumerates the grounds upon which a motion for relief from an order or judgment may be made. It specifies the following:

1) mistake, inadvertence, surprise or excusable neglect;

2) newly discovered evidence which by due diligence could not have been discovered before the court's decision;

3) fraud by the adverse party;

4) the judgment is void;

5) the judgment has been satisfied; or

6) any other reason justifying relief.

For the purposes of subparagraph (1), "gross carelessness" is insufficient to warrant reconsideration; nor is it sufficient that the party is "unhappy with the judgment." *See* 11 C. Wright & A. Miller, *Federal Practice and Procedure*, § 2858 at 170 (1973). "Mistake" in subparagraph (1) includes legal error by the Court. *Yniques v. Cabral*, 985 F.2d 1031, 1034 (9th Cir. 1993) ("[A] district court's erroneous reading of the law is a 'mistake' sufficient to require reconsideration of an order."). The terms contained in subparagraph (1), including "excusable" are interpreted strictly. A motion made under subparagraph (6) requires a showing that the grounds justifying relief are extraordinary. Again, the mere dissatisfaction with the court's order, or belief that the court is wrong in its decision, are not grounds for relief under subparagraph (6) or, for that matter, under any other subparagraph of Rule 60(b).

"'[T]he major grounds that justify reconsideration involve an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice.'" *Pyramid*

Lake Paiute Tribe of Indians v. Hodel, 882 F.2d 364, 369 n.5 (9th Cir. 1989) (quoting *United States v. Desert Gold Mining Co.*, 433 F.2d 713, 715 (9th Cir. 1970)).

DISCUSSION

Relators move for leave to file a motion for reconsideration of the Court's October 5 order on the grounds that the Court erred in applying the Rule 9(b) standard too strictly, because the additional specificity required involves information peculiarly within Defendants' control.[1] *See United States ex rel. Thompson v. Columbia / HCA Healthcare Corp.*, 20 F. Supp. 2d 1017, 1049 (S.D. Tex. 1998) (allowing relators to proceed to discovery without naming individual false claims, dates and details where relators had alleged with specificity "basic framework, procedures, the nature of the fraudulent scheme, and the financial arrangements and inducements"); *United States ex rel. Johnson v. Shell Oil Co.*, 183 F.R.D. 204 (E.D. Tex. 1998) (holding that relators need not plead specific details of individual false claims, such as specific dates

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[1] In a "notice of supplemental authorities," Relators also bring to the Court's attention the recent decision in *United States of America ex rel. Main v. Oakland City University*, 426 F.3d 914 (7th Cir. 2005), in which the Seventh Circuit held that a for-profit educational institution could be held liable under the FCA for payment of contingent fees to recruiters (the court described the compensation scheme at issue as one in which admissions representatives were allegedly "paid by the head"). Had the Court reached the question of FCA liability for violations of the HEA, *Main* would have been relevant persuasive authority, but it did not do so.

and invoice numbers, in order to meet requirements of Rule 9(b)).

Relators fail to show that this new legal argument, which was not raised in their opposition to Defendants' motions to dismiss the SAC, justifies reconsideration of the judgment against them. Relators claim that discovery is needed before they can plead "the amounts of the raises paid and the exact number of enrollments generated beyond each recruiter's enrollment quota," as such information is within Defendants' control. Relators' purported need for discovery misinterprets the Court's October 5 ruling. The Court did not find that Relators failed to plead exact amounts of raises and enrollments. Rather, the Court found that Relators failed to plead with specificity a "direct relationship" between raises and enrollments, such as granting recruiters a raise each time they recruited a certain (if unspecified) number of students. Instead, the allegations in the SAC were consistent with a mandatory minimum quota scheme which the Court had previously determined fell within the safe harbor regulation. If Relators do not possess information that would allow them to allege with specificity conduct by Defendants that falls outside the ED's safe harbor provisions, then Relators lack the necessary factual basis on which to file an FCA complaint.

CONCLUSION

For the foregoing reasons, Relators' motion for leave to file a motion for reconsideration is DENIED (Docket No. 101).

IT IS SO ORDERED.

Dated: 1/4/06

/s/
CLAUDIA WILKEN
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 04-320 CW

[Filed October 5, 2005]

UNITED STATES OF AMERICA, Ex Rel. MOUNTHASONE BOTT and SUSAN NEWMAN,	)
Plaintiffs,	)
v.	)
SILICON VALLEY COLLEGES, et al.,	)
Defendants.	)

Defendants U.S. Education Corporation (USEC), Silicon Valley Colleges and Western Career Colleges (the Colleges), and Greg Nathanson, Ellis C. Gedney and Darryl Lindsey (collectively, USEC Defendants) move pursuant to Federal Rules of Civil Procedure 12(b)(6) and 9(b) to dismiss the second amended complaint (SAC) of Relators Mounthasone Bott and Susan Newman (collectively, Relators). Defendant Almich & Associates (Almich) separately moves to

dismiss the SAC on the same grounds. Relators oppose the motions. The matters were heard on September 16, 2005.

Having considered all of the papers filed by the parties and oral argument on the motions, the Court grants the motions to dismiss.

BACKGROUND

Relators bring this *qui tam* action under the False Claims Act (FCA), 31 U.S.C. § 3729 *et seq*, against all Defendants on behalf of the United States to recover all federal educational grants, including Pell Grants, and all payments on federally insured educational loans used to fund students at the Colleges. The parties and claims are described in the Court's July 13, 2005 Order Granting Defendants' Motions to Dismiss.

As explained in that order, the Colleges must enter into a Program Participation Agreement (PPA) with the Secretary of Education in order to be eligible to participate in grant and loan programs authorized by Title IV of the Higher Education Act (HEA), 20 U.S.C. § 1070 *et seq*. 20 U.S.C. § 1094(a). The PPA conditions the Colleges' eligibility upon compliance with certain requirements, among others,

> The institution will not provide any commission, bonus, or other incentive payment based directly or indirectly on success in securing enrollments or financial aid to any persons or entities engaged in any student recruiting or admission activities or in making decisions

> regarding the award of student financial assistance . . . .

Id. § 1094(a)(20). The Department of Education (ED) has promulgated "safe harbor" regulations, which clarify that institutions may provide their admissions representatives with

> fixed compensation, such as a fixed annual salary or a fixed hourly wage, as long as that compensation is not adjusted up or down more than twice during any twelve month period, and any adjustment is not based solely on the number of students recruited, admitted, enrolled, or awarded financial aid. For this purpose, an increase in fixed compensation resulting from a cost of living increase that is paid to all or substantially all full-time employees is not considered an adjustment.

34 C.F.R. § 668.14(b)(22)(ii)(A). Nothing in the statute or the regulations addresses the conditions under which an institution may terminate its admissions representatives. In addition to the PPA, HEA requires that participating institutions submit to the ED the results of annual audits. 20 U.S.C. § 1094(c)(1)(A)(i).

In both the first amended complaint (FAC) and the SAC, Relators allege that Defendants falsely certified that the Colleges were in compliance with applicable federal law prohibiting incentive payments to admissions representatives. In the FAC, Relators alleged that they and other recruiters were paid a "socalled 'salary' . . . that was directly tied to an enrollment quota for that recruiter." FAC ¶ 47.

Pursuant to this arrangement, recruiters who failed to enroll their minimum quota were terminated, while those who exceeded the minimum quota were retained and given raises. In addition, admissions representatives who failed to "convert" a minimum percentage of leads into enrollments were also terminated. Relators also alleged in the FAC that Almich and another accounting firm, Weworski & Associates,[1] falsely certified in connection with annual audits that the Colleges were in compliance with federal eligibility requirements.

In its July 13, 2005 order, the Court dismissed the FAC pursuant to Rule 12(b)(6) for failure to state a claim and for failure to comply with Rule 9(b)'s requirement that the FCA allegations of fraud be plead with particularity.

The Court found that the FAC failed to state an FCA claim because the USEC Defendants' alleged system of recruitment quotas, in which employees who fail to meet the minimum enrollment quotas are fired and those who exceed the minimum are retained and given raises, fell within the safe harbor provisions of the ED's regulations. The Court reasoned that, although pay adjustments could not be based "solely" on the number of students recruited, the safe harbor provision reflected the ED's understanding that institutions could base salaries or salary increases on merit. The Court found that the regulations did not otherwise address the hiring and firing of admissions

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[1] The SAC does not name Weworski & Associates as a defendant.

representatives or an institution's ability to set mandatory recruitment quotas. The Court found that, in fact,

> Relators have not alleged any conduct that falls outside the safe harbor regulations. For example, they have not alleged that the Colleges provide more than two salary adjustments in a year not related to cost-of-living, or adjustments based "solely on the number of students" recruited.

July 13 Order at 10. Because the practices alleged were protected by the regulations, the Court concluded that Defendants could not be held liable for fraud under the FCA, even if the ED regulations were inconsistent with the HEA.

In the SAC, Relators allege generally and repeatedly that the Colleges "were paying commissions and other incentive compensation to recruiters based solely on their success at securing enrollments." SAC ¶ 13; *see also id.* ¶ 17 ("recruiters at SVC were paid substantial raises based solely on their success at securing enrollments"), ¶ 19 ("All Sales Representatives at [SVC] were paid solely based on the number of students they enrolled. . . . The salary of each sales representative was based solely on their enrollments."), ¶ 20 ("the enrollment quotas are assigned to the individual Sales Persons on the basis of the salaries they receive"), ¶ 21 (alleging that Mr. Nathanson informed Ms. Bott that "recruiters were rewarded according to success at securing enrollments") and ¶ 27 (recruiters "were promised they would receive raises based solely on their success in

securing enrollments beyond their minimum enrollment quotas . . . All recruiters who failed to meet their minimum enrollment quotas were terminated").

More specifically, Ms. Bott alleges that she had a minimum enrollment quota of approximately twelve students per month, and that she was fired after three months "solely because she failed to meet her enrollment quota." *Id.* ¶ 18. Relators allege that sales representative Indy De Croos was paid a starting salary of $40,000, and "received a $10,000 raise after his third month of employment solely based on the number of students he recruited. Indy received a second $10,000 raise later in the year based solely on his continued success as [sic] securing enrollments for the company." *Id.* ¶ 19. Relators also allege that other sales representatives were paid salaries varying between $50,000 and $90,000, but do not allege any additional details suggesting a specific relationship between those salaries and the number of students enrolled. Similarly, Ms. Newman alleges that, after enrolling eight students in her first two weeks of employment, she was told she "would receive a raise based solely on her ability to continue enrolling students" at that rate. *Id.* ¶ 24. One month later, she was "given a letter . . . stating that she was being terminated solely for failing to meet her enrollment quota." *Id.* ¶ 25. Relators also allege that USEC Defendants closely monitored sales representatives' enrollment figures, and that those who failed "to 'convert' a minimum percentage of leads into enrollments were also terminated." *Id.* ¶ 39.

The FAC alleged no details with respect to its claims against the individual Defendants or Almich.

The Court therefore found that Relators failed to allege with the requisite particularity their claims of fraud against those Defendants. In the SAC, Relators allege that individual Defendants Nathanson, Gedney and Lindsey "directed, authorized, ratified, and/or acted with knowledge or reckless indifference to the wrongful conduct described" in the SAC. *Id.* ¶¶ 5-7. Relators also allege that the recruiter compensation strategies described in the SAC were "conceived, designed, and implemented by the officers and shareholders Defendants Gedney, Lindsey, and Nathanson." *Id.* ¶ 78. Nathanson in particular is alleged to have "executed the Program Participation Agreements with the U.S. Department of Education on behalf of SVC and WCC." *Id.* ¶ 5. The SAC also states that Almich conducted compliance examinations of SVC for fiscal years 1997, 1998, 1999 and 2000; audited SVC's financial statements for fiscal years 1997, 1998, 1999, 2000, 2001 and 2002; and performed both the compliance examinations and the financial audits for WCC for fiscal years 1997, 1998, 1999, 2000, 2001 and 2002. *Id.* ¶ 8.

LEGAL STANDARD

"In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Fed. R. Civ. P. 9(b). The allegations must be "specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong." *Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir. 1985). Statements of the time, place and nature of the alleged fraudulent activities are

sufficient, *Wool v. Tandem Computers, Inc.*, 818 F.2d 1433, 1439 (9th Cir. 1987), provided the plaintiff sets forth "what is false or misleading about a statement, and why it is false." *In re GlenFed, Inc., Sec. Litig.*, 42 F.3d 1541, 1548 (9th Cir. 1994). Scienter may be averred generally, simply by saying that it existed. *See id.* at 1547; *see* Fed. R. Civ. P. 9(b) ("Malice, intent, knowledge, and other condition of mind of a person may be averred generally"). As to matters peculiarly within the opposing party's knowledge, pleadings based on information and belief may satisfy Rule 9(b) if they also state the facts on which the belief is founded. *Wool*, 818 F.2d at 1439.

DISCUSSION

I. Failure to Plead Fraudulent Statements with Specificity

Defendants move for dismissal on grounds, among others, that the SAC's allegations of conduct outside the protection of the ED's safe harbor regulations are not stated with the specificity required by Rule 9(b).

According to the SAC, Ms. Bott and Ms. Newman were fired "solely" for failing to meet their minimum enrollment quotas, and Mr. De Croos received one $10,000 raise "solely" based on the number of students he recruited and a second $10,000 raise in the same year based "solely on his continued success" at recruiting. Other than the insertion of the word "solely," the allegations do not differ substantially from the quota system described in the FAC, which the Court found fell within the safe harbor provision.

As the Court noted in its prior order, the ED's regulations were promulgated based on the assumption that the HEA does not prohibit institutions from basing "salaries or salary increases on merit," Dep't of Ed., Federal Student Aid Programs, 67 Fed. Reg. 67,048, 67,053 (Nov. 1, 2002), and neither the HEA nor the regulations otherwise addresses the hiring and firing of admissions representatives or quotas. The firing of Ms. Bott and Ms. Newman for failing to meet a mandatory quota does not constitute a "commission, bonus, or other incentive payment" prohibited by the HEA, and Relators in their opposition do not argue otherwise.

For admissions representatives responsible for increasing enrollment of students, there is necessarily a fine distinction between a permissible salary increase "based on merit" and an impermissible salary increase "based solely on the number of students enrolled." In order to state their fraud claim, Relators must allege with specificity a direct relationship between the raises given and the number of students enrolled. Other than frequently using the word "solely," the SAC does not do so. For instance, Relators do not provide any information demonstrating with specificity that there was a direct relationship between the number of students enrolled by Mr. De Croos and his two $10,000 raises. To the contrary, the specific facts alleged are equally susceptible to Defendants' interpretation, that fulfillment of quotas merely rendered Mr. De Croos eligible for two raises and thus fell within the safe harbor regulations. Without more detailed allegations showing the relationship between pay raises and the specific number of students actually enrolled by Mr. De Croos

or other admissions representatives, the Court finds that Relators have not described with particularity a pay structure that falls outside the safe harbor regulations.

As the Court explained in its previous order, such a pay structure would be necessary in order to maintain Relators' FCA action. *See* July 13, 2005 Order at 9-11. This reasoning applies as well to to the FCA claim against Almich, because Relators' fraud claim against it rests entirely on Almich's alleged ratification of the Colleges' alleged incentive payments. For these reasons, the Court finds that the SAC fails to meet Rule 9(b)'s requirement that the false or fraudulent statements by Defendants be alleged with particularity.

II. Failure to Plead Fraud with Respect to Specific Defendants

A. Individual USEC Defendants

USEC Defendants move for dismissal of the complaint on the grounds that the allegations against the three individual USEC Defendants, Nathanson, Gedney and Lindsey, fail to meet the requirements of Rule 9(b). As USEC Defendants note, the allegations against the individuals are for the most part so vague and conclusory that they do not allow each to know how he, in particular, is alleged to have participated in the Colleges' conduct. Relators do specify that Nathanson executed the PPAs. However, they do not identify the time, place and date of the alleged fraudulent or false statements for either Gedney or Lindsey. The only other allegations of wrong-doing

against the individual Defendants are collective accusations that attribute every act of the Colleges to each individual. Therefore, the Court finds that the SAC fails to meet Rule 9(b)'s particularity requirement with respect to the allegations against Defendants Gedney or Lindsey.

B. Almich

Almich also moves for dismissal pursuant to Rule 9(b) on grounds, among others, that it did not provide services for the Colleges during the times of specifically alleged fraud, if any.

In the SAC, Relators specify the years in which Almich conducted compliance examinations or financial statement audits; the last fiscal year for which Almich is alleged to have provided its services to the Colleges is 2002. The SAC makes clear that Almich's liability is premised on the Colleges' alleged failure to comply with federal law governing recruiter compensation. SAC ¶ 44. However, all of the SAC's specific, dated allegations of conduct in violation of the HEA refer to 2003 or later. Therefore, even if those allegations had met the requirements of Rule 9(b) with respect to the USEC Defendants, they would be insufficient to state with particularity circumstances for which Almich could be held liable for false or fraudulent statements.

CONCLUSION

For the foregoing reasons, USEC Defendants and Almich's motions to dismiss Relators' complaint (Docket Nos. 87 and 8, respectively) are GRANTED.

Because counsel stated at oral argument that Relators did not seek leave to amend to remedy the deficiencies identified by the Court, the dismissal is with prejudice.

USEC Defendants' request for judicial notice (Docket No. 26) is DENIED as moot. Judgment shall be entered in Defendants' favor; each side shall bear its own costs. The Clerk shall close the case file.

IT IS SO ORDERED.

Dated: 10/5/05

/s/ _____
CLAUDIA WILKEN
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 04-320 CW

[Filed July 13, 2005]

UNITED STATES OF AMERICA, Ex Rel. MOUNTHASONE BOTT and SUSAN NEWMAN,	)
Plaintiffs,	)
v.	)
SILICON VALLEY COLLEGES, et al.,	)
Defendants.	)

ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS

Defendants U.S. Education Corporation (USEC), Silicon Valley Colleges, Western Career Colleges, Greg Nathanson, Ellis Gedney, Darryl Lindsey, Barbara Bickett, George Montgomery and Leslie E. Pritchard (collectively, USEC Defendants) move pursuant to Federal Rules of Civil Procedure 12(b)(6) and 9(b) to

dismiss the first amended complaint (FAC) of Relators Mounthasone Bott and Susan Newman (collectively, Relators). Defendants Weworski & Associates (Weworski) and Almich & Associates (Almich) each separately move to dismiss the FAC on the same grounds. Relators oppose the motions. The matter was heard on July 1, 2005. Having considered all of the papers filed by the parties and oral argument on the motion, the Court grants the motions to dismiss.

BACKGROUND

Relators bring this *qui tam* action under the False Claims Act (FCA), 31 U.S.C. § 3729 *et seq*, against all Defendants on behalf of the United States to recover all federal educational grants, including Pell Grants, and all payments on federally insured educational loans used to fund students at SVC and WCC.

According to the FAC, SVC and WCC (hereinafter referred to collectively as the Colleges) are California corporations and "'proprietary institution[s] of higher education'" with multiple campuses in the San Francisco Bay Area region. FAC ¶ 24. They are subsidiaries of USEC, also a California corporation. Individual USEC Defendants Nathanson, Gedney, Lindsey, Bickett, Montgomery and Pritchard are executives, owners or administrators of USEC or its subsidiaries. Weworski is a certified public accountancy (CPA) firm in San Diego, California, that has conducted compliance examinations and financial audits for the Colleges. Almich is a CPA firm in Irvine, California, that has also conducted compliance examinations and financial audits for the Colleges.

Relators Bott and Newman were formerly employed as admissions representatives at the San Jose campus of SVC in 2003.

Relators allege that the Colleges falsely certified that they were in compliance with applicable federal law prohibiting incentive payments to admissions representatives. In order to be eligible to participate in the grant and loan programs authorized by Title IV of the Higher Education Act (HEA), 20 U.S.C. § 1070 *et seq.*, an institution must enter into a Program Act (FCA), 31 U.S.C. § 3729 *et seq*, against all Defendants on Participation Agreement (PPA) with the Secretary of Education.

20 U.S.C. § 1094(a). The PPA conditions the Colleges' eligibility upon compliance with certain requirements, *inter alia*,

> The institution will not provide any commission, bonus, or other incentive payment based directly or indirectly on success in securing enrollments or financial aid to any persons or entities engaged in any student recruiting or admission activities or in making decisions regarding the award of student financial assistance . . . .

Id. § 1094(a)(20). The Department of Education (ED) has promulgated "safe harbor" regulations, which clarify that institutions may provide their admissions representatives with

> fixed compensation, such as a fixed annual salary or a fixed hourly wage, as long as that

> compensation is not adjusted up or down more than twice during any twelve month period, and any adjustment is not based solely on the number of students recruited, admitted, enrolled, or awarded financial aid. For this purpose, an increase in fixed compensation resulting from a cost of living increase that is paid to all or substantially all full-time employees is not considered an adjustment.

34 C.F.R. § 668.14(b)(22)(ii)(A). Nothing in the statute or the regulations addresses the conditions under which an institution may terminate its admissions representatives.

In addition to the PPA, HEA requires that participating institutions submit to the ED the results of annual audits. 20 U.S.C. § 1094(c)(1)(A)(i). These audits must be conducted by a qualified, independent organization "in accordance with standards established by the American Institute of Certified Public Accountants." 20 U.S.C. § 1099c(c)(5).

Relators allege that the Colleges pay their admissions representatives based on an incentive salary structure, in violation of the HEA, 20 U.S.C. § 1094(a)(20). Specifically, according to the FAC, a "so-called 'salary' was paid to Relators, and to all other recruiters employed at the Colleges' campuses, that was directly tied to an enrollment quota for that recruiter." FAC ¶ 47. Pursuant to this arrangement, recruiters who failed to enroll their minimum quota were terminated, while those who exceeded the minimum quota were retained and given raises. In addition, admissions representatives who failed to

"convert" a minimum percentage of leads into enrollments were also terminated.

Relators identify two potential categories of resulting false certifications or false statements by USEC Defendants. First is the PPA, in which the Colleges agree to comply with all the requirements of 20 U.S.C. § 1094(a), including the ban on incentive compensation, in order to become eligible for participation in HEA programs. Second, Relators allege that the Colleges' management made false statements of compliance with the HEA to its auditors, which statements were then transmitted to the federal government as part of the annual audit. FAC ¶ 57-58.

Relators' claims against Weworski and Almich, referred to in the Complaint collectively as "Accountants," arise out of accounting services provided to the Colleges in connection with the annual audit requirements. Weworski and Almich allegedly falsely certified to the ED that they had audited financial statements in accordance with Generally Accepted Accounting Standards, that those financial statements were fairly presented in accordance with Generally Accepted Accounting Principles, and that the Colleges were in compliance with elgibility requirements. *Id.* ¶ 51-52. In addition, the Accountants allegedly "deliberately concealed and excluded from their compliance reports that [the Colleges'] recruiter compensation practices violated federal statutes." *Id.* ¶ 91. Relying on "doubtful explanations of management" about the compensation policy, Weworski and Almich allegedly failed to expand the scope of its audit, to evaluate critically the Colleges' high enrollment figures and high turnover of

admissions employees, or to seek an outside opinion regarding the legality of the Colleges' compensation practices, instead "interpret[ing] the law according to the companies' desires." *Id.* ¶¶ 105-109.

On May 26, 2004, the United States filed a Notice of Election declining to intervene in this case. However, the government has filed a document stating its position regarding some of the legal issues raised in the motions to dismiss.

LEGAL STANDARD

I. Motion for Dismissal under Rule 12(b)(6)

A motion to dismiss for failure to state a claim will be denied unless it is "clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Falkowski v. Imation Corp.*, 309 F.3d 1123, 1132 (9th Cir. 2002), *citing Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002). A complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). "Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required." Fed. R. Civ. P. 8(e). These rules "do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds on which it rests." *Conley v. Gibson*, 355 U.S. 41, 47 (1957).

When granting a motion to dismiss, a court is generally required to grant a plaintiff leave to amend, even if no request to amend the pleading was made, unless amendment would be futile. *Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc.*, 911 F.2d 242, 246-47 (9th Cir. 1990). In determining whether amendment would be futile, a court examines whether the complaint could be amended to cure the defect requiring dismissal "without contradicting any of the allegations of [the] original complaint." *Reddy v. Litton Indus., Inc.*, 912 F.2d 291, 296 (9th Cir. 1990). Leave to amend should be liberally granted, but an amended complaint cannot allege facts inconsistent with the challenged pleading. *Id.* at 296-97.

II. Special Pleading Standards

"In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Fed. R. Civ. P. 9(b). The allegations must be "specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong." *Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir. 1985). Statements of the time, place and nature of the alleged fraudulent activities are sufficient, *Wool v. Tandem Computers, Inc.*, 818 F.2d 1433, 1439 (9th Cir. 1987), provided the plaintiff sets forth "what is false or misleading about a statement, and why it is false." *In re GlenFed, Inc., Sec. Litig.*, 42 F.3d 1541, 1548 (9th Cir. 1994). Scienter may be averred generally, simply by saying that it existed. *See id.* at 1547; *see* Fed. R. Civ. P. 9(b) ("Malice, intent, knowledge, and other condition of mind of a person

may be averred generally"). As to matters peculiarly within the opposing party's knowledge, pleadings based on information and belief may satisfy Rule 9(b) if they also state the facts on which the belief is founded. *Wool v. Tandem Computers, Inc.*, 818 F.2d 1433, 1439 (9th Cir. 1987).

JUDICIAL NOTICE

USEC Defendants and Almich request that the Court take judicial notice of several unpublished district court cases dismissing similar claims against other for-profit institutions of higher education. USEC Defendants' Request for Judicial Notice, Ex. A, *United States ex rel. Hendow v. University of Phoenix*, No. S-03-457 GEB DAD (E.D. Cal. May 20, 2004), *appeal docketed*, No. 04-16247 (9th Cir. June 21, 2004), and Ex. B., *United States ex rel. Bowman v. Education America, Inc.*, No. H-00-3028 (S.D. Tex. Jan. 8, 2004); Almich's Request for Judicial Notice, Ex. A. (*Hendow*), Ex. B (*Bowman*) and Ex. C (*America ex rel. Main v. Oakland City University*, No. 3:03-CV-71 RLY-WGH (S.D. Ind. March 15, 2005). Relators do not object to judicial notice of *Hendow*, and ask the Court to take judicial notice of amicus briefs filed by the Solicitor General on the appeal of *Hendow* and on another pending case involving "reverse false claims," *United States ex rel. Bahrani v. Conagra, Inc.*, No. 04-1407 (10th Cir. 2004). However, Relators object to USEC Defendants' request for notice of *Bowman* on the grounds that it is unpublished, and seek a hearing on this issue.

Plaintiffs request that the Court take judicial notice of Senate Report No. 102-58, Abuses in Federal Student Aid Programs (1991).

Weworski and Almich request that the Court take judicial notice of the Audit Guide for Audits of Student Financial Assistance Programs at Participating Institutions and Institution Services (January 2000) written by the ED Office of the Inspector General, available online at http://ifap.ed.gov/aguides/attachments/sfgd2000.pdf. Relators do not object to this request.

Under Rule 201 of the Federal Rules of Evidence, a court may take judicial notice of facts that are not subject to reasonable dispute because they are either generally known or capable of accurate and ready determination. The Court takes judicial notice of *Hendow*. However, the Court denies all other requests for judicial notice as moot because they are unnecessary to resolve the motions. Relators' objection is likewise overruled as moot.

DISCUSSION

I. Dismissal under Rule 12(b)(6)

Relators' complaint alleges three counts of violation of the FCA. All Defendants contend that the complaint must be dismissed for failure to state a claim under Rule 12(b0(6) because *inter alia* USEC Defendants' acts, as alleged, fall within the safe harbor provisions of the ED's regulations.

Defendants argue that a system of recruitment quotas, in which those employees who fail to meet the minimum requirements are fired and those who exceed the minimum are retained and given raises, is conduct expressly permitted by an applicable ED regulation, 34 C.F.R. § 668.14(b)(22)(ii)(A). The ED's purpose in allowing semi-annual pay raises for admissions representatives was to describe payment arrangements that an institution could carry out "that have been determined not to violate the incentive compensation prohibition." Dep't of Ed., Federal Student Aid Programs, 67 Fed. Reg. 67,048, 67,053 (Nov. 1, 2002). Although pay adjustments may not be based "solely" on the number of students recruited, the ED promulgated the safe harbor provision based on its understanding that the "HEA did not imply that institutions could not base salaries or salary increases on merit." *Id.* at 67,053. Furthermore, as Defendants note, nothing in the HEA or in the ED's regulations otherwise regulates the hiring and firing of admissions representatives or an institution's ability to set mandatory recruitment quotas. *See Original Honey Baked Ham Co. v. Glickman*, 172 F.3d 885, 887 (D.C. Cir. 1999) ("A statute listing the things it does cover exempts, by omission, the things it does not list.").

Relators characterize those regulations as an unconstitutional modification of the statute, by which the ED exceeded the authority granted it by Congress and circumvented the failure of a legislative effort to loosen the HEA language. Relators' Opp. to USEC Defs.' Mot. Dismiss at 20-23. According to Relators, the ED safe harbor provisions have "effectively legalized the conduct directly prohibited in the Higher

Education Act." Relators' Opp. to Almich's Mot. Dismiss at 10.

Relators' focus on the unconstitutionality of the safe harbor regulations undermines the basis for their FCA claims. First, Relators' allegation that the Colleges' system of firing or promoting their admissions representatives violated federal laws is the only basis for Relators' contention that Defendants submitted "false or fraudulent" claims or statements to the government. Submission of false or fraudulent claims is an essential element of an FCA action. 31 U.S.C. § 3729(a)(1-3). The purpose of the safe harbor provision was to specify arrangements that did *not* violate the statute, and therefore Defendants were entitled to represent that they had complied with the law if their practices were protected by the regulations. *See Lucky v. Baxter Healthcare Corp.*, 183 F.3d 730, 732 (7th Cir. 1999) (noting that if an FCA defendant "complies with the existing regulations, it is entitled to represent to the government (and the world) that it has done so, without facing a claim of deception"). In fact, Relators have not alleged any conduct that falls outside the safe harbor regulations. For example, they have not alleged that the Colleges provide more than two salary adjustments in a year not related to cost-of-living, or adjustments based "solely on the number of students" recruited.

Furthermore, assuming *arguendo* that the safe harbor provision is unconstitutional and Defendants' acts did not comply with the HEA, Relators still cannot show that Defendants "knowingly" submitted false or fraudulent claims, another essential element. *See* 31 U.S.C. § 3729(a)(1-2). Neither the USEC Defendants

nor their accountants can be said to have possessed the requisite scienter, which is "'the knowing presentation of what is known to be false,'" if they were complying with ED regulations. *United States ex rel. Hochman v. Nackman*, 145 F.3d 1069, 1073 (9th Cir. 1998) (quoting *United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416, 1421 (9th Cir. 1991)). In *Hochman*, the court found that FCA defendants lacked the requisite scienter where they relied on agency guidelines, despite the fact that those guidelines were potentially inconsistent with other requirements. Here, the ED promulgated regulations precisely in order to clarify the governing law, and Defendants' reliance on those regulations precludes their FCA liability.

For these reasons, the Court grants Defendants' motions to dismiss for failure to state a claim under the FCA. Relators are granted leave to file a second amended complaint that addresses these deficiencies.

II. Failure to Meet Pleading Requirements

As in any cause of action sounding in fraud, the allegations of a FCA claim must be plead with particularity. *Bly-Magee v. California*, 236 F.3d 1014, 1018 (9th Cir. 2001). As such, they must be "'specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong.'" *Id.* at 1019 (quoting *Neubronner v. Milken*, 6 F.3d 666, 672 (9th Cir. 1993)). However, "Rule 9(b) may not require [the plaintiff] to allege, in detail, all facts supporting each and every instance of [a FCA

claim] over a multi-year period." *United States ex rel. Lee v. Smithkline Beecham, Inc.*, 245 F.3d 1048, 1051 (9th Cir. 2001).

While Relators have attempted to plead the elements of an FCA claim with respect to the Colleges and USEC (which allegedly "controls and directs" the Colleges' activities), the complaint contains no details regarding the liability of any of the individual USEC Defendants. Without any specific allegations against them, the individual Defendants cannot know how they are alleged to have participated in the Colleges' conduct, and how to respond to the complaint. If Relators choose to name individual Defendants in their SAC, they must meet the requirements of Rule 9(b) with respect to each.

Similarly, Relators' allegations against "Accountants" fail to specify which particular allegedly false or fraudulent claims or statements were done when and by whom. If Relators choose to name the accountant Defendants in their SAC, they must meet the requirements of Rule 9(b) and do so with respect to each firm separately.

CONCLUSION

For the foregoing reasons, USEC Defendants, Weworski and Almich's motions to dismiss Relators' complaint are GRANTED (Docket Nos. 24, 41 and 58, respectively).

Relators may file a SAC in accordance with the instructions above if they can do so truthfully and without contradicting the FAC. As the Court ruled at

the hearing, Relators must file any SAC within three weeks from the hearing date; any answer will be due three weeks later. Motions to dismiss must be noticed for September 16, 2005, at 10:00 a.m., at which time the Court will also hold a case management conference.

USEC Defendants' request for judicial notice (Docket No. 26) is GRANTED in part and otherwise DENIED as moot. Relators' first request for judicial notice (Docket No. 37) is GRANTED, but their second request for judicial notice is DENIED as moot (Docket No. 75). Weworski and Almich's requests for judicial notice are DENIED as moot (Docket Nos. 43, 60 and 78).

IT IS SO ORDERED.

Dated: 7/13/05

/s/ CLAUDIA WILKEN
CLAUDIA WILKEN
United States District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 06-15423
D.C. No. V-04-00320-CW

[Filed March 31, 2008]

UNITED STATES of America, ex rel. MOUNTHASONE BOTT; UNITED STATES of America, ex rel. SUSAN NEWMAN,

Plaintiffs-Appellants,

v.

SILICON VALLEY COLLEGES; WESTERN CAREER COLLEGES; GREG NATHANSON; ELLIS C. GEDNEY; DARRYL LINDSEY; STEVE GALLAGHER; BARBARA BICKETT; JANETTE C. MARQUEZ; PATRICK SUTHERLAND; U.S. EDUCATION CORPORATION, GEORGE MONTGOMERY; LESLIE E. PRITCHARD; ALMICH & ASSOCIATES,

Defendants-Appellees.

ORDER

Before **KOZINSKI**, Chief Judge, **COWEN*** and **HAWKINS**, Circuit Judges.

The petition for rehearing and rehearing en banc is denied *See* Fed. R. App. P. 35; Fed. R. App. P. 40.

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* The Honorable Robert E. Cowen, Senior United States Circuit Judge for the Third Circuit, sitting by designation.

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Supreme Court, U.S.
FILED
DEC 5 - 2008
OFFICE OF THE CLERK

No. 08-316

In the Supreme Court of the United States

UNITED STATES OF AMERICA EX REL. MOUNTHASONE BOTT; UNITED STATES OF AMERICA EX REL. SUSAN NEWMAN,
Petitioners,

v.

SILICON VALLEY COLLEGES; WESTERN CAREER COLLEGES; GREG NATHANSON; ELLIS C. GEDNEY; DARRYL LINDSEY; ALMICH & ASSOCIATES,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR REHEARING

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December 5, 2008

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ISSUE

The Ninth Circuit erred in holding that defendants are entitled to claim good faith reliance on 34 C.F.R. § 668.14(b) (22) (ii) (A) (Nov. 1, 2002).

FACTS

The Career College Association, the trade association representing the for-profit education industry, presented false testimony to the U.S. House of Representatives in order to obtain passage 107 H.R. 1992 in 2001. H.R. 1992 sought to amend 20 U.S.C. 1094(a)(22). Passage of said bill would have served to exonerate members companies from massive liability in lawsuits then pending seeking the recovery of $500 million in federal student financial aid paid by the U.S. Government. The November 26, 2001 letter from U.S. Congresswoman Patsy Mink to Senator Edward Kennedy pointed out the misconduct that had occurred by concealment of the existence of these lawsuits in the testimony given before Congress. *See*, Apx. 1: "HR 1992 passed the House on October 10, 2001. I was the principal opponent for all the reasons stated in the debate. Scott D. Levy's letter to me reveals certain very disturbing matters that compromise the enactment of HR 1992 at this time."

In holding that defendants were presumed to be in good faith reliance on the subsequently passed safe harbor regulation[1], the Ninth Circuit decision failed to address the misconduct that occurred in the passage of 107 H.R. 1992 clearly spelled out in Congresswoman

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[1] 34 C.F.R. § 668.14(b) (22) (ii) (A) (Nov. 1, 2002).

Mink's letter to Senator Kennedy. There should be no reward for lying to Congress. There is absolutely no mention in the Career College Association's testimony of these massive lawsuits against its membership. "I am appearing today on behalf of the Career College Association (CCA) and their 963 members." Apx. 3a. "The 963 members of the Career College Association enthusiastically support the concepts in HR 1992. We have included with this testimony suggested report language that we believe will help to further clarify the intent of the incentive compensation provision." Apx. 6a, Testimony of Omer Waddles, "H.R. 1992, the Internet Equity and Education Act of 2001" Committee on Education and the Workforce Subcommittee on 21st Century Competitiveness June 20, 2001.

ANALYSIS

"[T]he Secretary's decision is entitled to a presumption of regularity. [internal cites omitted]. But that presumption is not to shield this action for a thorough, probing, in-depth review." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415, 91 S.Ct. 814, 823, 28 L.Ed.2d 136 (1971). In conducting this review, the court "shall ... hold unlawful and set aside agency action, findings, and conclusions found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "without observance of procedure required by law." 5 U.S.C. 706.

CONCLUSION

There should be a thorough, probing, in depth review of the legislative events surrounding the passage of HR 1992 before any defendant receives the

benefit of the presumption that reliance on the regulation was in good faith. The Ninth Circuit decision completely disregarded this misconduct before Congress even though it was brought to the Court's attention.

Respectfully Submitted,

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CERTIFICATION

The foregoing is restricted to the grounds specified in 44.2 Sup. Ct. R. and it is presented in good faith and not for delay.

Scott D. Levy

Scott D. Levy
Counsel for Petitioners

APPENDIX

APPENDIX 1

[Letterhead]

Patsy T. Mink
Congress of the United States
2nd District, Hawaii

November 26, 2001

The Honorable Edward M. Kennedy
Ranking Member
Committee on Health, Education, Labor and Pensions
U.S. Senate
315 Russell Senate Office Building
Washington DC 20510

Dear Senator Kennedy:

I am referring the enclosed to your attention as matter pending before your Senate Committee.

HR 1992 passed the House on October 10, 2001. I was the principal opponent for all the reasons stated in the debate.

Scott D. Levy's letter to me reveals certain very disturbing matters that compromise the enactment of HR 1992 at this time.

It would be very critical that these matters of conflict with governmental efforts to recover over $500 million in federal student aid be scrutinized carefully.

Another case seeks $187 million repayment of student financial aid money against CLC Computer Learning Center.

These lawsuits raise very serious questions as to the propriety of moving forward on legislation that clearly goes to the conduct under question.

Very truly yours,

/s/
PATSY T. MINK
Member of Congress

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APPENDIX 2

Committee on Education and the Workforce
Hearings

http://republicans.edlabor.house.gov/archive/hearings/107th/21st/web62001/waddles.htm

Testimony of Omer Waddles

"H.R. 1992, the Internet Equity and
Education Act of 2001"
Committee on Education and the Workforce
Subcommittee on 21st Century Competitiveness
June 20, 2001

Executive Summary

Mr. Chairman and members of the Committee, thank you for this opportunity to come before the Committee to voice our support for H.R. 1992, The Internet Equity and Education Act of 2001. I am the Executive Vice President of ITT Educational Services, Inc. I am in charge of overseeing the operations for our 70 ITT Technical Institutes in 28 states with approximately 29,000 students. We provide career-focused, degree programs in the areas of technology.

I am appearing today on behalf of the Career College Association (CCA) and their 963 members.

The business processes in all industries have some form of information component, thereby requiring

those industries to require information technology specialists and other members of a "technology literate" workforce. To ensure that the nation remains competitive in the global economy, higher education institutions must respond to the increasing need for technology literate workers in their program design.

Complicating the situation are changes in the workforce. The current workforce already has difficulty finding time to upgrade skills and knowledge while working and attending to family needs. Even greater productivity pressures will occur when the large "baby boomer" cohort begins to turn age 62 and retire in 2008.

To ensure a sufficient technologically literate workforce, higher education will have to develop programs that are designed around the specific needs of three groups: current workers, retired boomers and disadvantaged or minority groups that are currently under-represented in the workforce. These groups each have different priorities and criteria that will affect the design of programming if it is to meet their respective needs.

Higher education institutions have turned to non-traditional methods of educational programming in recent years to try to meet these differing needs. Generally, educational programming has been changed to allow it to be accessed either in the home or in other physical locations convenient to the student. Program calendars have become more flexible to assist workers with issues such as heavy work demands or travel schedules. To better serve the workforce, this trend must be extended.

The spirit of the Higher Education Act of 1965, as amended, was to increase student access to education. That spirit is even more important today as we face workforce changes. Several Department of Education regulations, created prior to the recent technology and economic trends, have outlived their original intent and have as a by-product a punitive effect on students who prefer non-traditional educational programming and scheduling. These students do not have equal access to financial aid, as do students of traditional in-class programs.

HR 1992 includes proposed remedies to some of these challenges by:

- Reducing the burden of the online 50-percent rule and allowing financial aid to be provided to students who are attending schools with default rates below 10% but have more than 50% of their programs available online;

- Eliminating the 12-hour rule and stipulating that traditional and non-traditional programs should be held to the same attendance criteria.

HR 1992 also provides needed guidance on the subject of compensation of employees involved in recruiting or providing student financial aid. It clarifies that incentive compensation restrictions apply only to *non-sal*ary payments to those *directly* involved in either of these two activities.

The 963 members of the Career College Association enthusiastically support the concepts in HR 1992. We

have included with this testimony suggested report language that we believe will help to further clarify the intent of the incentive compensation provision.

I. Education Issues in Workforce Development

Dot-com meltdowns have captured the popular press, but the real impact of the information technology evolution is "Act Two" of the New Economy. This is being seen in the depth of the change that has taken place in the traditional sectors of the full economy. According to the Information Technology Association of America (ITAA) over 90% of the IT jobs are being created in these traditional businesses. That is because business processes in all industries have some information creation or exchange component, and the improved efficiencies related to the streamlining of these business processes should be a top priority of the nation to insure our continued business competitiveness.

As the Department of Commerce reported in "Digital Economy 2000," information technology is being used to improve design and engineering, conduct R&D, reduce development time, simplify manufacturing, manage inventory, facilitate training, improve customer service and reduce costs. According to Commerce, "Although IT industries still account for a relatively small share of the economy's total output—an estimated 8.3 percent in 2000—they contributed nearly a third of real U.S. economic growth between 1995 and 1999." Clearly IT has become an engine for the creation of economic activity and business growth.

Demand for information technology workers is anticipated to continue as more industries integrate the Internet and its protocols into their internal business processes. The Bureau of Labor Statistics predicts that, between 1998 and 2008, the number of computer support specialists will have increased by 102 percent and database administrators by 77 percent. The Information Technology Association of America's study found that 425,000 IT jobs would go unfilled this year alone. Another estimate came from the consulting firm META Group and their estimate claimed that those unfilled information technology jobs would number at least 600,000. In addition, the META Group also found a widening salary gap. This occurs as technology workers' salaries are continuing to increase at a faster rate than their non-technology related counterparts.

In past decades it was the presence of or lack of, of material or financial assets that dictated the level of success of a business endeavor. Today it is the presence or lack of, of human intellectual capital that is the proven predictor of success. The obvious conclusion is that we must do everything we can to nurture the development of information technology workers and a "technology literate" workforce if we, as a nation want to insure our continued competitive abilities. We must make good on the traditional promise of real *"access to quality"* education for all those who seek it.

In its report "A Nation of Opportunity," the 21st Century Workforce Commission stated, "Many IT jobs require, at a minimum, an associate's degree and/or specific postsecondary school certifications attained through specialized technical training. A large

percentage of IT jobs require a postsecondary education degree, with rigorous computer science and engineering degree programs representing the primary path to the Core IT Professions. These requirements reflect general labor market trends in which a premium is placed on advanced education and training."

We, as educators, must respond to this critical need by providing current and future programs that will develop a technologically literate workforce.

Workforce Challenges

However, there are other workforce issues looming before us in the coming decades. "Baby boomers," the largest—and most educated—population cohort the nation has ever seen, is about to enter retirement. How will industry respond to this societal shift that will further deplete the available workforce?

One obvious effect will be increased productivity pressures on the remaining, smaller workforce. This smaller group of workers is the same ones that the Department of Labor predicts will move through at least five different careers during their working years. Preparation for five careers certainly will mean the need for continuous acquisition of new knowledge and skills. Lifelong learning will become a living necessity to these workers. Their career and changing employers will demand easy access to our previously mentioned learning opportunities. These customers are already demanding that they have more choices with regard to the delivery, style and content of these educational services. They want these products delivered when and

where they choose not in the traditional manner where the institution chooses the means and methods.

Another response industry may take is to provide incentives for the "Boomer" cohort to remain in or re-enter the active workforce. An AARP study found that many of today's aging workers are very receptive to this idea of retention or reengagement of employment. Eighty percent of the workers surveyed in this "Boomer" population expect to work at least part-time in retirement. The Bureau of Labor Statistics projects that the workforce participation rate for those aged 55 and older will rise to 36.8 percent by 2008, the year in which the oldest "Boomers" will turn 62. That is a 5.5 percent increase over the actual 1998 participation rate.

Additional qualitative studies also indicate that in order to be attractive to "Boomers" the job they would consider returning to must be intellectually challenging and has some form of financial security. Phoenix-based retirement community developer Del Webb Corporation has scrapped plans for shuffleboard courts and replaced them with computer labs and college classrooms in their facilities. To continue to play an important role in evolving technology and the new economy, "Boomers" will require their own access to quality education and will choose in many cases to define it for themselves. To keep this valuable working resource engaged and up-to-date employers must continuously upgrade the "Boomer's" array of technology skills.

A third response industry and the nation should undertake to shore up the technology literate workforce is to insure access for those groups currently

under-represented: women, minorities, those with physical disabilities, and the economically disadvantaged in our cities and rural areas. These diverse groups are in the greatest need of more choices in their menu of training and education. We no longer can afford to let them sit on the sidelines of today's industry. We need their active participation in all aspects of this complex working world. These programs that are designed to work with each group's unique needs must include the same commitment to access and quality that we want for all programs.

Challenges for Educators

So the burden falls on educators representing all types of institutions to step up their ability to meet this challenge. One thing we should be able to agree on is that increasing the educational attainment of our citizenry is a better long-term investment than the temporary solutions that include importing short-term Band-Aid help with the use of visas and work permits. Business understands the importance of having the workforce available at a moment's notice. This requires investment in the people we can see and touch today and those who are being trained currently for tomorrow's needs.

What do we, as education providers, have to consider as we design programming to meet the demand for technology literate workers? Here just a few of the problems we currently face:

- More than 40 percent of full-time postsecondary students already work either part- or full-time.

- Increasing numbers of full-time workers are returning to school to improve skills or change careers.
- The younger cohorts working full-time find it increasingly difficult to balance work, family life and the desire or demand for more education.
- Working parents have difficulty in arranging childcare so they can attend class.
- Workers and retirees alike resist commuting to classes.
- Potential students in economically disadvantaged areas lack transportation to class and support from their families.
- Potential students in rural areas are too far from classes.
- Potential students whose parents did not have postsecondary education may lack the confidence or motivation to embark on a postsecondary program for themselves.

Is it any wonder, then, that higher education has begun to utilize a number of "non-traditional" methods and settings to make educational offerings available? The National Center for Educational Statistics found that in the 1997-98 school year, almost 44 percent of all higher education institutions offered distance-based courses, an increase of one third from just three years earlier. Enrollment in postsecondary distance education courses more than doubled during that time, to 1.6 million students nationwide. The research firm, International Data Corporation, estimates that 2.2 million students are expected to enroll in online courses by 2002.

Like the new economy, distance learning can not go away. Use of techniques including non-classroom sites,

collaborative study, independent learning, on-the-job programs and distance learning programs help students, especially working adults, overcome many of the barriers I have listed that face students today.

II. HR 1992 Increases "Access to Quality" in Education

What many institutions of higher education need, in order to fulfill our important role in retooling the workforce, is the ability to be flexible enough to design programs that meet the varying needs of students, and to do so with the most efficient operation possible. The critical role of the oversight triad of state and federal government and the accrediting agencies is to ensure the quality of the programs that are made available and the administrative capability of the institutions. What is not effective is the use of narrow and artificial barriers that fail to focus on the quality of the product and only address the process. It is the student who gets lost in the battle between quality and process.

It was the original intent of the Higher Education Act of 1965, as amended, to increase students' access to quality in postsecondary education. Pursuing that original intent is even more important today as education plays an increasingly important role in helping our workforce to stay competitive in an ever-changing global economy. We acknowledge that the pre-eminent concern of the Department of Education has been to insure the quality and reliability of educational programs. However, we do believe the role of the Department of Education should not be solely focused on determining what type of programs are most effective or are believed to be the most accepted or desirable. Instead we suggest the Department

should be fostering an environment in which higher education institutions have the flexibility to develop many types of programs targeted at accommodating the increasingly wide array of needs of students.

A number of the regulations promulgated by the Department of Education over the past three and one-half decades have outlived their original intent and applicability to today's needs and demands. The learning environment of the global economy is demanding more of us than what we placed on the books in the seventies and eighties. The legislation we are commenting on today, H.R. 1992, helps us all begin a new journey targeted at ensuring the same things we have wanted since 1965. It helps us to focus on how best to provide to our nation's students access to educational services that meet their needs in their own specifically defined educational time and place. Access to not just any program, but programs and providers that meet high levels of quality and effectiveness.

The 50 Percent Rule

For example, the "50 percent rule." This rule was created in response to various concerns about the level of quality in correspondence courses back in the late 1970's and early 1980's. This rule does not reflect the highly effective communications and interactive teaching methods developed for use on the Internet only in the last few years. By offering only reduced financial aid to those pursuing an online education, the rule in effect punishes students who have selected that method because of family, health or location considerations. This not only restricts access, it hampers workforce development in the very types of

technology education and training the country needs most to remain competitive.

Higher education institutions and accrediting bodies have made great progress in creating and recognizing sound technology-based teaching methodologies. In lieu of using the outdated standard of "seat time," the Department should maintain its oversight responsibilities by allowing recognized accrediting bodies to set new and innovative standards that hold education providers accountable.

HR 1992 as proposed provides a sound first step as a remedy for this inequity. It allows institutions to offer more than 50 percent of their courses by telecommunications, thereby supporting access. It also provides barriers of entry to entities that have not previously demonstrated sufficient quality standards by requiring current participation in the student loan program. While doing this we interpret the legislation as not removing the participation of those that are already involved with the current demonstration programs for distance education. In a subsequent section, I will recommend broadening the bright line test of the singular 10% loan default provision to include additional measurements of quality.

The 12-Hour Rule

While initially well intended so as to insure programs comply with a traditional form of quality programming, the result of the non-legislative "12-hour rule" has meant that access by interested students was restricted. Many students have family responsibilities, heavy workloads, travel schedules or other personal factors that prevent them from

attending a traditional classroom program. These same individuals can and do participate in many forms of more flexible educational programs that include features such as self-paced designs, weekend schedules and online components. Accrediting bodies are fully capable of insuring that these programs produce results that are at least equal to those of traditional programs. Some of these newly designed programs require students to meet only once per week. Therefore, the Department should not punish students enrolled in non-traditional programs by allowing them only reduced levels of financial aid.

HR 1992 contains the desirable remedy that requires that traditional and non-traditional programs should be held to the same attendance criteria.

Incentive Compensation

Some in the Department have interpreted the statutory language on compensation of recruiters and financial aid personnel more broadly than we believe Congress originally intended. All institutions, whether not-for-profit or for-profit, must be allowed to utilize standard business management practices in the promotion of their institutions, the enrollment of students and the processing of financial aid. As a result of the over broad interpretation, colleges and institutions are being asked to evaluate and then compensate employees by measuring activities that are not central to their employment. No one is supporting the return to what we saw in the early 1980's where there were some unscrupulous providers who were recruiting individuals out of welfare lines for schools that had no substance or educational value. That is not the case today. We do not have those

headlines, and if we do, every part of the oversight triad is charged with ridding the system of those charlatans. But all of us have to measure our recruiters and financial aid administrators on the work that they are hired to do. To do anything less would not be supporting the basic premise of an honest day's wage for an honest day's work. I think the technical changes included in this bill will help the Department better interpret the intent of the legislation and allow them to avoid the unnecessary narrowing of what is allowed in the area of salary and compensation. To tell a college they can employ a person to be a recruiter or representative but they cannot link the compensation of that individual to their work product would be the same as attempting to tell congressional constituents they cannot consider a candidate's voting record during an election.

The current environment, in which the education community has been given little or no detailed interpretation of the regulation, has constrained us from many times hiring and retaining the personnel we need, utilizing innovative promotion techniques provided by third parties, and with some interpretations, from allowing owners and managers of for-profit colleges to participate in the financial successes of their schools.

HR 1992 makes great strides in clarifying that incentive compensation restrictions apply only to *non-salary* payments to those *directly* involved in recruiting students or awarding financial aid. The bill also creates the structure by which violations are met with appropriate rather than unfairly punitive sanctions.

In summary, HR 1992 provides much needed relief from outdated regulatory constraints and provides greater flexibility to allow institutions to develop educational programming that can meet student needs and to pursue the enrollment of those students in an efficient and effective manner.

III. Recommendations

I am here today on behalf of the 963 members of the Career College Association, representing over one million students, to say that we enthusiastically support HR 1992 as it is written. It contains important reforms that will be beneficial to traditional and non-traditional students alike.

I do have a personal comment with respect to the modification of the 50-percent rule. The bill's current language stipulates that an institution must have a student loan default rate of less than 10 percent for the three most recent years in order to qualify for this waiver of the 50-percent rule. This is a good first step. Two years form now when Congress considers reauthorizing the Higher Education Act, we urge the Congress to consider using other indicators of institutional success. Use of performance factors present a more well rounded picture of the institution and avoid the historic over-reliance upon a single bright line test. By using a single blunt edged tool, we are saying that you are a good distance education provider if you are on one side of the line and you are assumed to be a less effective provider if you are on the other side of the line. Quality is again what we are striving to ensure, not just process.

In addition, CCA asks that you consider adopting our proposed report language to help further clarify the issues related to the incentive compensation provision:

The reference to "other incentive, non-salary payment" clarifies that the statutory prohibition extends only to bonuses, commissions, and similar payments. It does not apply to setting or prospe:tively adjusting salary from time to time, based on performance of legitimate job functions.

The reference to payments "based directly on success" in securing enrollments clarifies that institutions may provide incentive compensation to admissions personnel based on their performance of legitimate recruiting activities that are commonly undertaken by recruiters on behalf of institutions of higher education prior to enrollment and the start of classes. Such activities and practices include, but are not limited to, recruiting visits to high schools or other sources of prospective students; telephone calls and similar communications (including written letters and e-mail) aimed at recruiting prospective students; personal interviews of prospective students; the giving of tours to prospective students; the provision of various academic and general, school-related information to prospective students; and obtaining certain information from prospective students, including but not limited to applications, transcripts, high school diplomas, and other documentation needed to complete an

application to enroll at an institution of higher education.

The change in language also is intended to permit employee, senior manager and owner participation in the profits of the institution or the award of bonuses, stock options or stock based upon the financial performance of the institution.

The reference to persons or entities "directly engaged" in recruiting or awarding financial aid clarifies that the statutory prohibition applies only to those who directly recruit students or award financial aid. It does not apply to supervisors or higher level executives, although they may supervise such persons or be above them in the institution's organizational chart, that do not recruit prospective students or award financial aid. The provision also does not apply to payments to a third party, such as a Web services provider, as long as the employees of the third party are not themselves paid a commission based on success in directly securing enrollments or financial aid."

Thank you for this opportunity to provide testimony to the Committee on this important piece of legislation. We believe that HR, 1992, The Internet Equity and Education Act of 2001, is a needed piece of legislation of which CCA and its member institutions support passage. As I stated earlier, I believe this represents an exciting starting point for the evolution of our laws, rules and regulations in the area of higher education. We need to continue reviewing all aspects of the programs and participants in higher education

to ensure their compatibility with the demands of our changing economy.

Thank you.